

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE**

Richard Moulton

v.

Civil No. 11-cv-391-JL

Carroll County Department
of Corrections, et al.

SUPPLEMENTAL REPORT AND RECOMMENDATION

Before the court for consideration are the arguments raised in the defendants' objection (doc. no. 32) to this court's December 14, 2011, report and recommendation (doc. no. 26). The district judge has denied plaintiff's objections (doc. no. 39), and has referred defendants' objection (doc. no. 32) to this magistrate judge for "a supplemental report responding to the specific arguments made by the county in support of its objection." The court considers each of defendants' arguments below.

1. Ground I - The Court's Findings of Fact are Contrary to the Evidence

The first argument in the defendants' objection (doc. no. 32) is that the findings upon which the court based its recommendation were "contrary to the evidence." In particular, defendants challenge the court's findings that defendants did

not agree to fill all of the teeth that Moulton's dentist had recommended filling, and that they did not explain why they had agreed only to fill a few of those teeth. Defendants have asserted in their objection that they did not agree to fill all of Moulton's teeth because: (1) Moulton is a pretrial detainee who might be released prior to having all of his teeth filled, so that the County cannot be held responsible for filling all of them; (2) defendants intend to provide only reasonably necessary treatments, including pain treatment, and to reevaluate treatment on an ongoing basis; and (3) teeth cannot be filled if a patient is experiencing inflammation, infection, or discomfort, and "to the best of the defendants' knowledge and belief, [Moulton's teeth] continue to suffer from infection and/or discomfort despite treatment with antibiotics and anti-inflammatory drugs."

The court notes, initially, that the defendants' objection rests almost entirely on information not before the court at the time of the preliminary injunction hearing, not submitted to the court until the filing of this objection, and unsupported by anything except the defendants' attorney's affidavit that he believes the assertions to be true. To the extent defendants argue that the court misapprehended their intent, the court

finds that there was no ambiguity in the County's November 1, 2011, letter stating it would authorize fillings in three teeth. The County now asserts for the first time that when it expressed a willingness to fill three of the sixteen teeth at issue, it actually meant that it would provide all reasonably necessary treatments. Such unsupported assertions are insufficient to alter the court's recommendation, which was based on evidence and documents submitted by the County.

The defendants have demonstrated and expressed reluctance to commit to provide treatment to Moulton due to the uncertainty of Moulton's release date. Defendants' concern is that they will be obligated to continue to provide treatment to Moulton after he is released. There is no suggestion in the court's recommendation, however, that the County would be expected or obligated to provide dental care to Moulton after his release from the Carroll County Department of Corrections ("CCDC"). Nonetheless, the court will clarify its recommended injunction to include the sentence: "Any obligations imposed on the CCDC by this injunction will terminate upon Moulton's release from incarceration."

Defendants assert that Moulton's teeth cannot be filled because of Moulton's continuing unwillingness to have certain

teeth extracted, and the existence of infection, inflammation, and pain in Moulton's mouth. These assertions were not before the court at the time it issued the report and recommendation and are not at this time supported by any evidence or documentary corroboration. The statements in the defendants' objection and the unsupported averments of counsel in his affidavit do not warrant reconsideration of the court's recommendation for an injunction.

2. Ground 2 - The Timing is Not Appropriate for Injunctive Relief

Defendants argue that the issue of filling Moulton's teeth is not yet ripe for adjudication because it is as yet unknown how plaintiff will respond to pre-filling dental treatments, and whether Moulton will remain incarcerated at the CCDC. The court's December 14, 2011, recommendation was based on its findings of a demonstrated need for dental care already necessary at that time. Further, the recommended injunction addresses the timing issue by requiring that the CCDC provide dental treatment only as deemed medically appropriate by a dentist. Accordingly, should dental care that is recommended now become medically inadvisable in the future, for any reason, the proposed injunction would not obligate the CCDC to provide

such care. The court has already addressed the issue concerning Moulton's indeterminate tenure at the CCDC through the proposed clarification of the injunction, as set forth above.

Defendants reassert arguments that they made in their underlying objection to plaintiff's motion for a preliminary injunction. Defendants suggested that, in order to obtain fillings through the CCDC medical request and grievance process, plaintiff was obliged to refile his requests for fillings by omitting requests for reparative work, then filing separate requests, complaints, or grievances to garner authorization for fillings. That argument was addressed in the report and recommendation and found to be without merit, and need not be readdressed.

3. Ground 3 - The "Challenged Conduct" Has Not Caused "Irreparable Harm"

Defendants argue that because Moulton initially requested an injunction to obtain fillings and root canals, he was bound to demonstrate that both the lack of fillings and the County's refusal to pay for root canals caused him irreparable harm, in order for an injunction to issue. The court, however, limited its findings concerning irreparable harm to the CCDC's failure to fill cavities, and designed the injunction only to require medically necessary dental care on certain teeth. Nothing in

the defendants' objection provides any reason to revisit that recommendation.

4. Ground 4 - Filling of Minor Cavities Undermines the Public Interest

The court recommended an injunction that, if approved, will require the CCDC to provide dental care deemed necessary by a dentist. If plaintiff has a minor cavity that it is not medically necessary to fill, nothing in the recommended injunction would require the CCDC to provide such a filling.

Defendants also reassert their previously rejected argument that providing dental care for minor problems leads to people trying to get arrested and jailed for minor offenses in order to get dental work done. To bolster that argument, defendants have cited, but have not provided to this court, a motion to continue filed in Moulton's criminal case, which is based, at least in part, on Moulton's anticipated dental work. Whether or why Moulton attempted to continue his criminal case is irrelevant to his present need for dental care. The court stands on its previous findings concerning the public policy implications of the recommended injunction.

5. Ground 5 - The Injunction Is Not Narrowly Drawn

Defendants object on the basis that an injunction should "extend no further than necessary" to correct the harm. The court's recommended injunction, if approved, would require the CCDC to provide only medically necessary dental work. The defendants' argument, made for the first time in the instant objection, that filling certain cavities is unnecessary based on the United States Marshals Service's Prisoner Health Care Standards, is irrelevant to this court's findings of medical necessity and the injunction at issue.

6. Ground 6 - Willingness To Provide Care

Defendants argue that they are willing to provide some dental care. While not included in the objection, defendants have filed as an exhibit to another objection filed in this case (doc. no. 45), documents from Moulton's dentist indicating that CCDC officials diligently scheduled dental appointments for Moulton in January 2012, but that for reasons beyond the control of the parties, those appointments could not be kept. A letter from the dentist indicates that another appointment has been scheduled for Moulton, and that he is on a list to be seen sooner by the dentist if an appointment becomes available. Due to this apparent willingness to schedule an appointment as soon

as possible, the court now finds that the first portion of the recommended injunction, reproduced below, is unnecessary:

1. Within fourteen days of the date of this order, defendants shall schedule the first available appointment with Dr. Kempton, or another suitable dentist, to obtain dental treatment for Moulton.

Conclusion

Upon consideration of the defendants' objection to the court's report and recommendation, the court, for the reasons discussed herein, finds that nothing in the objection alters its recommendation made in the December 14, 2011, report and recommendation (doc. no. 26) in this matter, with two exceptions:

1. The court finds that the first paragraph (numbered 1) of the recommended injunction is unnecessary and should be omitted from the injunction if the District Judge elects to adopt the court's recommendation that an injunction issue.
2. The injunction should be modified to include the following sentence: "Any obligations imposed on the CCDC by this injunction will terminate upon Moulton's release from incarceration."

Any objections to this Report and Recommendation must be filed within fourteen days of receipt of this notice. See Fed. R. Civ. P. 72(b)(2). Failure to file objections within the specified time waives the right to appeal the district court's order. See United States v. De Jesús-Viera, 655 F.3d 52, 57 (1st Cir. 2011), cert. denied, 181 L. Ed. 2d 768 (2012); Sch. Union No. 37 v. United Nat'l Ins. Co., 617 F.3d 554, 564 (1st Cir. 2010) (only issues fairly raised by objections to magistrate judge's report are subject to review by district court; issues not preserved by such objection are precluded on appeal).



Landya McCafferty
United States Magistrate Judge

February 21, 2012

cc: Richard Moulton, pro se
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LBM:jba